Signature Flight Support *and* Judith Fumero. Case 12–CA–19431

May 2, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

On October 6, 1999, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging employees Blanca Cintron, Judith Fumero, and Carmen Reyes. In its exceptions, the Respondent argues, inter alia, that the discharges of the three employees did not violate the Act under the *Wright Line* standard.[3] For the following reasons, we find no merit in the Respondent's exceptions.

In brief, the facts are as follows. In February 1998[4] the Respondent's human resources manager, Nilda Rios, suggested to a group of employees identified as "leads" that they put their work-related concerns in writing.[5] The leads' letters in response complained about the conduct of another group of employees identified as "cleaners." The leads' letters focused on five or six cleaners, including the three alleged discriminatees. The judge found that the letters conveyed the clear impression that the alleged discriminatees as a group were urging other employees to act collectively for their mutual aid and protection. The judge also found, however, that some of the letters indicated that the alleged discriminatees had engaged in activities that are clearly not protected by law, for example, refusing to perform work.

After receiving these letters in mid-March, and without conducting any investigation, Rios recommended to her superiors that Cintron, Fumero, and Reyes be discharged. The judge found that higher management "rubberstamped" Rios' recommendation. After receiving approval, Rios discharged Cintron on or about March 18, and discharged Fumero and Reyes on or about March 20.

As the judge recognized, it is unlawful for an employer to discharge employees in the belief that they engaged in concerted activity for the purpose of mutual aid or protection. *U.S. Service Industries*, 314 NLRB 30, 31 (1994) ("Actions taken by an employer against an employee based on the employer's belief the employee engaged in or intended to engage in protected concerted activity are unlawful"), enfd. mem. 80 F.3d 558 (D.C. Cir. 1996).

Applying this principle here in the context of a *Wright Line* analysis, we find that the General Counsel made a showing sufficient to support the inference that the Respondent's belief that Cintron, Fumero, and Reyes engaged in protected concerted activities was a motivating factor in the Respondent's decision to discharge them. Thus, as found by the judge, the record clearly shows that the Respondent relied on the leads' letters in deciding to discharge the three employees, and those letters focused on the employees' complaints about working conditions and their appeals to other employees to join them. The factor of timing also supports the inference of unlawful motivation because the discharges occurred immediately after the Respondent was placed on notice of the employees' protected concerted activities.

We further find that the Respondent has not met its burden under *Wright Line* of demonstrating that it would have discharged the three employees even in the absence of its belief that they engaged in protected concerted activities. Before the judge, the Respondent asserted that it terminated the alleged discriminatees because they had refused to work and therefore were insubordinate. The Respondent relied on the references to the refusals to perform work assignments in the leads' letters and record testimony that such refusals were repeatedly brought to the attention of a supervisor. The judge, however, did not credit any testimony that Cintron, Fumero, and Reyes refused to perform work assignments. Instead, based on

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify par. 2(e) of the recommended Order to conform to the Board's decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Containers, Inc*., 325 NLRB 17 (1997). We shall also modify the notice to conform to the recommended Order.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). We do not adopt the judge's discussion in fn. 2 of his decision of a *Wright Line* "presumption."

[4] All subsequent dates are in 1998.

[5] As background, the record shows that in January employee Fumero delivered a letter to the Respondent's manager, Lester Wiggins, complaining about working conditions, including harassment by leads. Shortly thereafter, Wiggins spoke to the leads about the complaints and told them that he would not tolerate harassment. The judge found, and we agree, that while the January letter did not play any part in the Respondent's decision to discharge the three alleged discriminatees, the letter did "set in a motion a chain of events which culminated in the terminations."

his assessment of the record as whole, the judge found that the employees complained about work assignments, but then performed them. As stated in footnote 2, supra, we find no basis for reversing the judge's credibility findings.[6] The judge relied not only on his observations of the demeanor of the witnesses, but also reasoned that it was implausible that the Respondent, which was subject to strict time deadlines by its customers, would have tolerated employees who had refused to work as frequently as the Respondent's witnesses claimed. In addition, we agree with the judge that the Respondent's defense is undermined by the fact that, contrary to its own practice, the Respondent did not conduct an investigation or give the employees an opportunity to respond to the allegations against them. Accordingly, as the Respondent's explanations for the discharges were found to be incredible and unsupported by the record, the Respondent has not met its burden of proving that it would have taken the same acton even in the absence of the employees' protected concerted activity. We therefore conclude that the Respondent violated Section 8(a)(1) of the Act by discharging Cintron, Fumero, and Reyes.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Signature Flight Support, Orlando, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Orlando, Florida facility copies of the attached notice marked "Appendix. B"[5] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 18, 1998."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX B
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employee because he or she engaged in concerted activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Judith Fumero, Blanca Cintron, and Carmen Reyes full reinstatement to their former jobs or, if those jobs no longer exist, reinstatement to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Judith Fumero, Blanca Cintron, and Carmen Reyes whole for losses of earnings and other benefits suffered as a result of their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges of Judith Fumero, Blanca Cintron, and Carmen Reyes, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

SIGNATURE FLIGHT SUPPORT

[6] The Respondent's exceptions brief points to disciplinary warnings given to Fumero and Reyes for refusing to remove trash on February 26, 1998. The judge's credibility findings, however, include the discrediting of the lead who furnished the information on which these disciplinary warnings were based. In any event, this alleged incident is not closely connected in time to the discharges, which did not occur until approximately 3 weeks later.

David Anhorn, Esq., for the General Counsel.
Michael Taylor, Esq. and *Benedetto Stevens, Esq. (Verner, Liipfert, Bernard, McPherson & Hand),* of Washington, D.C., for the Respondent.
Judith Fumero, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on June 21–23, 1999, in Orlando, Florida. After the parties rested, I heard oral argument on June 24, 1999, and on June 25, 1999, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach as "Appendix A," the portion of the transcript containing this decision.1

Two of the findings in the bench decision warrant additional di scussion. First is my conclusion that the three alleged discriminatees had engaged in protected concerted activities. Second is my conclusion that Respondent's stated reason for discharging these three employees was pretextual, resulting in an inference of animus.

With respect to the first issue, whether the alleged discriminatees had engaged in protected, concerted activities, in *Plumbers Local 412*, 328 NLRB 1079 (1999), the Board panel unanimously adopted the decision of the Honorable Mary Miller Cracraft, dismissing a complaint after finding that the alleged discriminatee had not engaged in concerted activity. Judge Cracraft's decision reviewed the development of Board law concerning what activity is concerted, and what activity is not.

As Judge Cracraft noted, an individual employee acting with or on the authority of other employees and not solely on his or her own behalf is engaged in concerted activity. *Meyers Industries (Meyers I),* 268 NLRB 493, 497 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), decision on remand *Meyers Industries (Meyers II),* 281 NLRB 882, 885 (1986), enfd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

When an individual employee tries to persuade other employees to prepare for or engage in group action, that one employee's advocacy falls within the definition of concerted activity. *Meyers II*, 281 NLRB at 887. A battle cry of "follow me" constitutes concerted activity if uttered to enlist fellow employees in common cause, even if the other employees do not follow. See, e.g., *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998).

As discussed in Appendix A, the record here contains extensive evidence that the three alleged discriminatees, Fumero, Cintron, and Reyes, were not simply "griping" for reasons unrelated to concerted action, but voiced their complaints specifically to awaken similar concerns in their fellow workers. Before deciding to discharge Fumero, Cintron, and Reyes, the managers involved in that decision reviewed Respondent's Exhibit 20(h), one of a number of letters and memos from the leads and coordinators. Respondent's Exhibit 20(h) reported that when some other employee disagreed with the position taken by Fumero, Cintron, Reyes, and another employee, these four would "tell them that they must all stick together for their beliefs."

This same document reported that the four complaining employees would tell other workers, in effect, that they were "stupid" if they allowed "the company to treat you as slaves." Moreover, other evidence, discussed in Appendix A, establishes that the alleged discriminatees acted together for their mutual aid and protection. I find that the evidence clearly establishes that Fumero, Cintron, and Reyes engaged in concerted activity.

Additionally, I find that their actions were protected by the Act, as well as concerted. The alleged discriminatees urged their fellow workers to protest matters related to working conditions, such as who should do certain work and how it should be done. See, e.g., *Timekeeping Systems, Inc*., 323 NLRB 244 (1997); *American Red Cross Blood Services*, 322 NLRB 590 (1997).

The second matter warranting further discussion here concerns my finding that animus motivated the Respondent's actions. Although the complaint alleged such statements which, if established, would constitute evidence of animus, I found that the credited evidence did not prove these alleged violations. Instead, my finding of animus rests on an inference.

I have concluded that Respondent offered a pretextual explanation for discharging the three employees, Fumero, Cintron, and Reyes, alleged as discriminatees in the complaint. From that conclusion, and from the timing of the discharges, I have inferred that Respondent acted, at least in part, from antiunion animus.

Basing this essential finding on inference makes this case very close. Board precedent allows a finding of animus to rest on indirect evidence in appropriate cases, see, e.g., *Montgomery Ward & Co*., 316 NLRB 1248, 1253 (1995), but recent Board decisions also have shown instances when drawing such an inference is inappropriate. For example, in *J. O. Mory, Inc*., 326 NLRB 604 (1998), the Board reversed a judge's finding of unlawful motivation based upon one instance in which the respondent departed from its customary, and facially valid, hiring practices. See also *Frierson Building Supply Co.,* 328 NLRB 1023 (1999), in which the Board again found an inference of animus unwarranted.

In the present case, Respondent has asserted that it terminated their employment because they had refused to work and therefore were insubordinate. However, I find that the credible evidence fell short of establishing that they refused to work.

It also is implausible that a company which must meet strict deadlines to make a profit, and which must pay a penalty if its employees fail to finish the task on time, would tolerate employees who refused to work. Considering this implausibility together with the absence of credible evidence showing that Fumero, Cintron, and Reyes refused to work, I conclude that Respondent's proffered explanation is not the real one.

Additionally, in deciding whether it is appropriate to infer animus, I have considered the timing of the discharges. However, in light of the Board's holding in *Frierson*, it is important to specify exactly which time period, in my opinion, raises the suspicion of animus.

In *Frierson*, less than 3 months had gone by, a much shorter period than present here, *if* the elapsed time is measured from the end of the union organizing campaign in July 1997. However, for the reasons discussed in the bench decision, I conclude that the union organizing campaign had little relevance to the events in this case. The protected activity which aroused the Respondent's animus began in January 1998, and continued up until Respondent discharged Fumero, Cintron, and Reyes in March 1998. Although this interval is more comparable to that in *Frierson*, it is not the time period which raises the specter of animus.

Rather, there is another, even shorter period of time which, I believe, suggests a link between the protected activities of the three alleged discriminatees and the Respondent's decision to discharge them. That period is the brief interval between when Managers Lehmann and Zunk read the letters and memos from the leads—documents which placed them on notice of the three employees' protected concerted activities—and when they decided to discharge these employees. In my view, this short time, together with the absence of credible evidence to support Respondent's explanation that the three alleged discriminatees had refused to work, justify the inference of animus.

In deciding whether animus should be inferred, it is also useful to consider the amount of animus which the General Counsel must demonstrate to meet the government's initial burden of proof.2 The General Counsel does not have to show that a miasma of animus palpably

[1] A computer malfunction made it necessary to deliver the bench decision extemporaneously without reference to the draft I had prepared. The transcript attached has been revised for clarity as well as corrected to eliminate transcriptional and typographical errors.

[2] In the bench decision, I have referred to the government's "prima facie case." In light of recent cases, that terminology may require clarification. See, e.g., *Tres Estrellas de Oro*, 329 NLRB 50 at fn. 2 (1999); *Schaeff, Inc. v. NLRB*, 113 F.3d 254 (D.C. Cir. 1997), discussing *Office of Workers' Compensation v. Greenwich Collieries*, 512 U.S. 267 (1994).

As I have applied the *Wright Line* analysis, the General Counsel must prove that animus was a factor—more specifically, a "substantial or motivating factor," *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996)—in Respondent's decision to take adverse employment action. In other words, the General Counsel must prove by a preponderance of the evidence that animus was present during the decision-making process.

On the other hand, the General Counsel does not have the burden, during the government's case in chief, of coming forward with evidence showing that *but for* the existence of animus, the respondent would not have taken the adverse employment action. In effect, once

thickened the air around the managers when they made the discharge decisions. Rather, the government only has to prove that some animus was present, just enough to be a "substantial or motivating factor."

For the reasons discussed above, I conclude that this amount of animus may be inferred. That conclusion begins, rather than ends, the inquiry as to whether, but for the animus, Respondent would have discharged the three employees.

Once the General Counsel has demonstrated the presence of animus in the decision-making atmosphere, the Respondent then must show that its decision was not tainted by it. In other words, the Respondent must come forward with proof that it would have taken the same action against the alleged discriminatees even if they had engaged in no protected activities.

To make such a showing, an employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. See, e.g., *Held & Held Masonry, Inc.,* 328 NLRB 1090 (1999); *Greenfield Die & Mfg. Corp*., 327 NLRB 237 (1998), *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989).

Respondent did not present evidence sufficient to show that the presence of animus during its decision–making process did not affect the outcome of that process. Stated another way, it did not demonstrate that even in the absence of animus, it would have discharged Fumero, Cintron, and Reyes.

CONCLUSIONS OF LAW

1. Respondent, Signature Flight Support, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. On or about March 18, 1998, Respondent discharged its employee Blanca Cintron. On or about March 20, 1998, Respondent discharged its employees Judith Fumero and Carmen Reyes. Respondent discharged Cintron, Fumero, and Reyes to discourage employees from engaging in concerted activities protected by the Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

3. Respondent did not violate the Act in other respects alleged in the complaint.

4. The violations described in paragraph 3, above, affect commerce, and unless enjoined will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached as Appendix B. Respondent must be ordered to offer immediate and full reinstatement to Blanca Cintron, Judith Fumero, and Carmen Reyes, and make them whole, with interest, for all losses they suffered because of the Respondent's unlawful discrimination against them.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended3

ORDER

The Respondent, Signature Flight Support, Orlando, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee because he or she engaged in concerted activities protected by the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Judith Fumero, Blanca Cintron, and Carmen Reyes full reinstatement to their former jobs or, if those jobs no longer exist, reinstatement to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Judith Fumero, Blanca Cintron, and Carmen Reyes whole, with interest, for all losses of earnings and other benefits suffered as a result of the unlawful discrimination against them.4

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharges of Judith Fumero, Blanca Cintron, and Carmen Reyes, and within 3 days thereafter notify these employees in writing that this action has been taken and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Orlando, Florida, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."5 Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

BENCH DECISION

JUDGE LOCKE: This case arose because of the Complaint that the Regional Director of Region 12 of the National Labor Relations Board issued on behalf of General Counsel of the Board on October 27th, 1998.

I heard the case on June 21st, 22nd and 23rd when the Parties presented evidence.

Yesterday, June 24th, counsel for the parties gave oral argument and today I am giving the Bench Decision. The Complaint alleges that Respondent made unlawful threats to employees, and that it discriminated against three employees by discharging them in violation of Section 8(a)(1) of the Act. Although I find that the evidence does not establish that Respondent made the threats alleged in the Complaint, I find that the discharges of the three employees were unlawful.

Certain facts are undisputed. I address those facts first, then go to an overview of the case, and then to the specific allegations.

I. UNDISPUTED FACTS

The Respondent has admitted the allegations in Paragraph 1 of the Complaint regarding filing and service of the charge. I find that the original charge in this proceeding was filed by the Charging Party on April 17, 1998 and that copies were served by regular mail on Respondent on April 21, 1998.

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the government proves that animus was a "substantial or motivating factor," a rebuttable presumption arises that but for this animus, the adverse employment action would not have occurred. However, the existence of this presumption does not relieve the General Counsel of the burden of persuasion.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

[4] Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

I also find that the first amended charge was filed on April 29, 1998 and served by regular mail on May 1, 1998, and that the second amended charge was filed by the Charging Party on September 9, 1998 and that copies were served by mail on Respondent on that same date.

The Respondent has also admitted facts establishing that it is an Employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. And at hearing, Respondent orally amended its Answer to specifically admit the allegation in Complaint Paragraph 2(c) to that effect. So I find that the Respondent has been and is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

Respondent has also admitted that Ms. Nilda Rios, the regional human resources manager, and Mr. Lester Wiggins, the department manager, are supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. I so find.

II. OVERVIEW OF THE CASE

Signature Flight Support is engaged in providing services to companies that operate and fly airplanes, both airlines, such as Continental Airlines, and also companies that provide charter flights. Services that the Employer provides include cleaning the inside of the plane, which is done by the people classified as cabin service employees or cleaners. Other employees, who work outside the planes, are classified as ramp service employees.

This case does not really concern the ramp service employees, but does concern three of the cabin service employees who clean the passenger compartments of the planes. The Complaint alleges that the Employer unlawfully discharged these three: Blanca Cintron, Judith Fumero, and Carmen Reyes.

Although Respondent admits discharging the three employees, it has denied that it did so because they had engaged in activities protected by the National Labor Relations Act, or to discourage other employees from engaging in protected activities. The central issues in this case concern the lawfulness of the three discharges. However, certain other issues are also in dispute.

III. DISPUTED ISSUES

A. Status of "Leads" and "Coordinators"

There are about 60 people involved in cleaning airplanes and about 8 to 10 people who are classified as the leads. At hearing, the General Counsel orally amended the Complaint to allege that these "leads" and other persons classified as "coordinators" were agents of the Respondent. Later in the hearing, the General Counsel further amended the Complaint orally to allege that these same individuals were supervisors of the Respondent.

"Leads" are essentially persons who work alongside employees to clean airplanes. They perform the same sort of duties as the other employees in that they clean lavatories and galleys and sack up trash and take it to the dumpster. But they also have additional responsibilities which include making changes in the scheduling of employees to compensate for airplanes arriving for service at times other than the times at which they were scheduled to arrive.

Besides that, they do tell employees what tasks to do and review the work of employees. For example, if a cleaner has cleaned a lavatory but left the floor wet or cleaning supplies still in the lavatory, then the lead may, on occasion, tell the cleaner to put away the supplies and dry the floor.

I find it unnecessary to the resolution of this case to decide whether or not the leads are supervisors or agents. However, I think the evidence falls short of establishing that they are supervisors.

Since the General Counsel is the proponent of a finding that the leads have supervisory status under the statute, the General Counsel bears the burden of showing that the leads meet all necessary indicia under Section 2(11) of the Act, including the requirement that, in the exercise of any of the functions enumerated in Section 2(11), the lead employee exercises independent judgment.

I find that the evidence in this case is insufficient to establish that they exercise independent judgment.

There is a closer question as to whether the leads are agents of the Employer or, even if not agents as sanctioned by the Employer, whether they exercise apparent agency in speaking for the Employer in certain situations. I am not reaching that issue because I find it unnecessary to the resolution of this case.

The other persons in dispute are classified as coordinators. They seem to occupy a position in the hierarchy which is below the supervisor, Mr. Wayne Pettigrew, but above the leads, in that they are involved in the scheduling of employees.

There is some evidence in the record that employees who are resistant to taking instruction from the leads nonetheless acknowledge that they have to follow the instructions of the coordinators. The record does not establish that the coordinators exercise sufficient independent judgment to meet the definition of "supervisor" in Section 2(11) of the Act. I need not reach the question of whether the coordinators were actual or apparent agents of the Respondent, because it is not necessary to deciding this case.

Even though the record does not establish that the coordinators and leads are supervisors or agents of the Respondent, there is not doubt that the leads occupy a rather unique position somewhat distinct from the employees classified as cabin cleaners. The leads tell these employees what to do, at least using routine judgment if nothing more, and the leads also review the employees work.

Additionally, the leads feel an obvious pressure and desire to get the work done as quickly and efficiently as possible. This pressure arises because Respondent's contract with the airline provides a bonus for doing a job more quickly than the allowed time specified in the contract, and provides a penalty for doing it more slowly.

To some extent, the work of the cleaners and leads involves two contrasting extremes, not unlike those experienced in a fire department. The tedious time spent waiting for a plane to arrive changes quickly to the urgent activity necessary to avoid a penalty and earn a bonus.

The leads feel the pressure of mobilizing the cleaners and focusing their attention on doing the work in less time than the deadline allows. In this sense, the leads' interest clearly is identified with management. But evidence in the case also indicates that the leads, if not in conflict with their immediate supervision, at least did not always receive a sympathetic ear from Mr. Wayne Pettigrew, their immediate supervisor, and his boss, Mr. Lester Wiggins.

As will be discussed later in this decision, the leads became discontented with the response their complaints received from their immediate supervisors and decided to go over their heads to a manager in human resources. This action began the chain of events which lead to the discharge of the three employees alleged as discriminatees in the Complaint. Before discussing these events, however, I will consider other allegations raised by the Complaint.

B. The Alleged Threats

Complaint paragraphs 5, 6 and 7 allege that Respondent made threats which, according to Complaint paragraph 8, interfered with, restrained and coerced employees in violation of Section 8(a)(1) of the Act. To prove these allegations, the General Counsel relied on the testimony of one witness, Judith Fumero.

That testimony contradicted the testimony of the two managers who allegedly made the threats, Nilda Rios (with respect to the allegations in Complaint paragraph 6) and Lester Wiggins (with respect to the allegations in Complaint paragraphs 5 and 7). Therefore, I will begin by addressing these credibility conflicts.

Based upon my observations of the demeanor of Ms. Fumero, I cannot credit her testimony as being reliable. I am not saying that she deliberately tried to falsify testimony because I do not believe that is true. To the contrary, I believe she tried to be an honest witness.

However, she did react very emotionally to the facts of the case and at one point I called a recess in the hearing so that she could regain her composure. I believe that the strong emotional involvement of Ms. Fumero necessarily affected her perception of the events and, perhaps, her recollection of the events.

Besides that, I found it difficult, in listening to Ms. Fumero's testimony, to distinguish between what she had actually observed and her interpretation of what she actually observed. An illustration of this is her testimony that her immediate supervisor, Mr. Wayne Pettigrew—who is a retired staff sergeant from the United States Marine Corps—carried either an invisible whip or a leather whip with invisible tips. I believe she used both phrases.

When I heard her say those words and observed her, Ms. Fumero's demeanor suggested to me that she was intending the words to be understood literally. But after a clarification, it became apparent that she was just expressing her opinion about Mr. Pettigrew's attitude and doing so by casting that opinion in the form of a very vivid visual image.

Such impressionism certainly has its place in art, but when truth is presented in the form of such impressions, it is more useful to the artist than to someone who must make detailed findings of fact. Therefore, I must rely upon the more literal testimony of other witnesses, for the same reason that an astronomer doing research would choose the images from the Hubble Space Telescope rather than a print of Van Gogh's "Starry, Starry Night."

Where there is a conflict in the testimony, based upon the demeanor of the witnesses, I will credit Ms. Rios and Mr. Wiggins rather than Ms. Fumero.

Complaint Paragraph 5

Paragraph 5 of the Complaint alleges that in or about February 1998, a more precise date being unknown to the General Counsel at this time, Respondent, by Lester Wiggins, at the Orlando facility, threatened employees with unspecified reprisals because of their protected concerted activities.

In closing argument, Counsel for the General Counsel said that he could not find evidence to support that allegation. I will recommend that it be dismissed.

Complaint Paragraph 6

Paragraph 6 of the Complaint alleges that in or about February 1998, a more precise date being unknown to the General Counsel, Respondent, by Nilda Rios, at the Orlando facility, threatened employees with unspecified reprisals, because of their protected, concerted activities. However, I can find nothing in the record that indicates any conversation took place in February 1998 which would resemble the allegations of Paragraph 6. Ms. Fumero did testify concerning a conversation she had with Ms. Rios several months earlier.

According to Ms. Fumero, around Thanksgiving of 1997, she encountered a man known only in the record as "Michael", who identified himself as a new manager at Continental Airlines and asked what he could do to be of help to the Signature Flight Support employees who were cleaning the planes. In response, Ms. Fumero recited some of the complaints of the cleaners, the asserted absence of gloves, the use of harsh chemicals, and similar work-related problems.

Ms. Fumero testified that some time after this conversation, Ms. Rios called her in and said that she should not engage in "Union tactics." Ms. Fumero testified that this was the third time Ms. Rios had spoken of her engaging in "Union tactics."

Ms. Rios denies making any comment about Union tactics.

Based upon the demeanor of the witnesses, I credit Ms. Rios. It is very possible Ms. Fumero thought about what she did in terms of Union tactics because when she talked with this man named Michael, she referred to "local issues," which is a term that a Union official or shop steward might use. So it is possible that Ms. Fumero associated the statements she made to "Michael" with union activity in her mind, but crediting Ms. Rios, I find that Ms. Rios did not say the things attributed to her by Ms. Fumero.

There is no credited evidence that would support a finding that there was any threat of reprisal or force or promise of benefit. I find that there is no credible evidence that Section 8(a)(1) of the Act was violated as alleged in Complaint paragraph 6. Therefore, I recommend that this allegation be dismissed.

Complaint Paragraph 7

Paragraph 7 of the Complaint alleges that on about March 10, 1998, Respondent, by Lester Wiggins, at the Orlando facility, threatened employees with unspecified reprisals, because of their protected, concerted activities. The government relies upon the testimony of Judith Fumero to prove this allegation. However, the testimony does not establish that there was any conversation between Mr. Wiggins and Ms. Fumero on March 10, 1998. Such a conversation would be highly unlikely because Ms. Fumero was out on worker's compensation at that time.

The General Counsel has urged that I consider that the conversation took place at another time and that Ms. Fumero may have gotten the date wrong.

Ms. Fumero, in effect, testified that Mr. Wiggins told her to keep her nose out of other people's business and not to try to represent employees. According to Ms. Fumero, Mr. Wiggins said that Florida was a working state, that no one would support her in her quest, and that she would have no place to go, to which she replied that she could go to the NLRB and left his office.

Mr. Wiggins, whose testimony I credit, testified about a couple of conversations with Ms. Fumero which apparently may have gotten combined in her recollection, although the testimony is not entirely clear on that point. In one conversation described by Mr. Wiggins, Ms. Fumero complained about a new attendance policy which the Respondent had announced by February 12, 1998 memo.

Ms. Fumero, who had moved to Florida from New York, told Mr. Wiggins that parts of the new policy were unlawful under New York law. Mr. Wiggins testified that he responded that they were in Florida, and that New York law did not apply. Based upon my observations of the witnesses, I find that Mr. Wiggins made the comment about being in Florida, rather than New York, in response to a statement by Ms. Fumero that the new attendance policy violated New York law. Such a statement did not violate Section 8(a)(1) of the Act.

As I have already stated, it appears that Ms. Fumero's memory may have fused more than one conversation into a single event. According to Mr. Wiggins, whom I credit, on one occasion Ms. Fumero asked Mr. Wiggins if she would get in trouble if she represented the ramp employees. Mr. Wiggins and Ms. Fumero were on good terms as supervisor and employee, so I do not find it particularly unusual that Ms. Fumero would feel at liberty to ask Mr. Wiggins this question, although it is a bit unusual that Ms. Fumero would want to assume the duty of representing unrepresented employees in a different job classification. However, she had been a shop steward in her previous employment and perhaps she wanted to do it because of that experience.

Mr. Wiggins, whom I credit, testified that he told Ms. Fumero that he did not think she would get in trouble, but he also told her to be careful about representing the ramp employees because she was a cleaner, not a ramp employee, and the job duties were different.

I find that Mr. Wiggins made the comments he described in his testimony. However, I find that his statements contained no suggestion that Ms. Fumero should be careful because she might get in trouble for engaging in concerted activities.

In sum, I find that the evidence does not establish that Respondent threatened employees with unspecified reprisals as alleged in Complaint paragraph 7. Therefore, I recommend that this allegation be dismissed.

The Discharges

Paragraph 8 of the Complaint alleges that Respondent discharged three employees, and Paragraph 9 alleges that these discharges violated Section 8(a)(1) of the Act. Specifically, paragraph 8(a) alleges Respondent terminated the employment of Blanca Cintron on about March 18, 1998, and paragraph 8(b) alleges that it discharged Judith Fumero and Carmen Reyes on about March 20, 1998.

There is no dispute that the Respondent did discharge the named employees on or about the dates alleged. Uncontradicted testimony establishes that Regional Human Resources Manager Nilda Rios, with approval from two other officials of Respondent—Human Resources Manager Ronald Zunk and General Manager Mark Lehmann—made this discharge decision.

However, Respondent does deny the unlawful motivation alleged in Complaint Paragraph 8(c), which states:

> Respondent engaged in the conduct described above in paragraphs 8(a) and 8(b) because its employees engaged in the conduct described above in paragraph 4, and to discourage employees from engaging in these or other concerted activities.

Paragraph 4 of the Complaint alleges that on about January 2, 1998, Ms. Fumero, on behalf of herself and other employees, presented to Respondent a letter which complained about working conditions. Although Complaint paragraph 4 does not explicitly allege that Fumero's presentation of the letter to Respondent constituted concerted activity protected by the Act, the Complaint as a whole makes that premise clear.

The Complaint does not allege that Fumero or other employees engaged in any other activities protected by the Act, apart from presenting Respondent with the January 2, 1998 letter. Additionally, the Complaint does not allege that Respondent violated Section 8(a)(3) of the Act, which prohibits discrimination to encourage or discourage membership in a labor organization. Nonetheless, at hearing, General Counsel pointed to a union organizing campaign that took place in the Spring of 1997 as being relevant to this case on the issue of protected, concerted activities. I respectfully disagree.

The small amount of evidence we have on the Union organizing campaign suggests that it ended around July 10, 1997. No election was conducted. A union was not recognized or

certified. The Charging Party here, Ms. Fumero, rather vigorously denied participating on behalf of the union and the union organizing campaign.

Ms. Fumero did admit that she would tell employees about her experiences as a shop steward when she lived in another state and worked for another employer. However, there is no evidence that the management of the Company knew about such statements by Ms. Fumero at the time it discharged her. Also, approximately nine months had elapsed between the time of the end of the Union organizing campaign and the time that Ms. Fumero and the other Discriminatees were discharged. So I do not believe that the Union organizing campaign in 1997 has a lot of relevance to this case.

In my view, the relevant facts begin on January 2, 1998, when Ms. Fumero brought to the manager, Mr. Lester Wiggins, the letter described in Complaint paragraph 4. That letter, which is in evidence as General Counsel's Exhibit 2, states, in pertinent part:

> We, the under-signed employees of Flight Support employed full-time and part-time are writing this letter to you because we have exhausted all avenues trying to get help with the problems we have been facing.
>
> Talking to our superiors in the Personnel Department has elicited no results. This letter is in the nature of a grievance. The following are our list of grievances:
>
> 1. Tyranny
> 2. Harassment
> 3. Intimidation
> 4. Lack of Recognition
> 5. Threats incurred by leads and support staff
>
> This matter is very important to my job security.
> Your consideration will be greatly appreciated. We respectfully request an acknowledgement.

(GC Exh. 2)

Ms. Fumero testified that attached to this letter was a list or a sheet that contained the signatures of other employees. The evidence does not establish that management had this list of other employees' signatures. At one time it is possible that Mr. Wiggins may have had it, but the evidence does not establish that the three individuals who were involved in making the decision to discharge the three alleged Discriminatees, namely Ms. Rios, Mr. Zunk, and the general manager, Mr. Lehmann, had seen either the list attached to the letter or the letter itself, or even were aware of this letter.

Possibly, Mr. Lehmann was aware of it, but I credit the testimony of Mr. Zunk and Ms. Rios that they were not aware of it. Nonetheless, the letter is important. Although the evidence does not establish that the letter itself motivated the discharge—the managers who made the discharge decisions were not even aware of the letter at that time—the letter still set in motion a chain of events which culminated in the terminations.

When Ms. Fumero presented the letter to Manager Wiggins, he considered it carefully. Mr. Wiggins credibly testified that he had a respect for Ms. Fumero. Also, I believe it was manifest from his demeanor when he testified about Ms. Fumero that Mr. Wiggins liked her and respected her. Not only did he take the complaints in Ms. Fumero's letter seriously, he acted on them.

Very shortly after receiving it, Mr. Wiggins called two meetings, a meeting of the cabin cleaners and another meeting of the leads. His meeting with the cabin cleaners dealt with other issues in addition to the matters raised in Ms. Fumero's letter. These issues included a question about wage increases. Mr. Wiggins said he would look into that matter.

In his meeting with the leads, Mr. Wiggins said that if there had been instances of harassment, he would not tolerate them. Mr. Wiggins also met individually with leads who could not attend the meeting as a group, and communicated the same message.

As I mentioned, the leads were in sort of a unique position which, in my mind at least, evokes the old anecdote about being in a swamp trying to drain it when you have an alligator problem. In other words, it would not surprise me at all if the leads felt that the people who were sitting in offices did not have an appreciation of the rigors of their job.

When they heard Mr. Wiggins make a stern statement that there shall be no harassment, it appears that some of the leads reacted by thinking, "well, what about us? We get harassed as well." So their supervisor's "no harassment" comment caused some foment among the leads. But so far as I can tell from the evidence, although there was discontent among the leads, nothing else happened at that time in early January 1998.

However, in February there was a time when the human resources manager, Ms. Nilda Rios, spoke with the leads about their frustrations. I credit Ms. Rios' testimony that she "invited" the leads or suggested to the leads that they put their concerns in writing.

The response from the leads was almost a volcanic eruption. These letters and memos from the leads filled Respondent's Exhibit 20(b) through 20(k).

Initially in considering this evidence, it was tempting to regard this outpouring of letters as somewhat analogous to a "flaming" on the Internet. In other words, the leads were upset that Ms. Fumero had stirred up problems with her January 2, 1998 letter, and decided to "flame" her by sending all these letters to management. Likening the leads' response to a "flaming" would suggest a willful and deliberate vendetta.

But there is another way to look at it which I think is probably more accurate: When Ms. Rios suggested to the leads that they send her letters describing their complaints, it was like opening the valve on a boiler where the pressure already had gone into the red, resulting in an almost volcanic eruption of steam. The motivation was not vengeance but a desire for relief.

The leads' letters focused on five or six individuals, three of them being the alleged Discriminatees and two or three being people who were not discharged. Ms. Rios reviewing these documents and decided that she would recommend that three employees, Ms. Cintron, Ms. Reyes, Ms. Fumero, be discharged.

Ms. Rios' superior is Ronald Zunk, the human resources manager for the entire company. When he was in town, Ms. Rios got together with Mr. Zunk and with Mr. Mark Lehmann, the Respondent's general manager for Orlando. The testimony pretty consistently shows that Mr. Zunk and Mr. Lehmann, in effect, rubber-stamped what Ms. Rios wanted to do. They took a brief, cursory look at the leads' letters and memos and agreed with Ms. Rios' recommendation to discharge the three alleged discriminatees, saying, in effect, "okay, these employees are guilty of insubordination because they have refused to work."

Mr. Lehmann testified that he considered that the three employees who were discharged had been abusive to the leads and had refused to follow their instructions. Therefore, he concluded that the discharges were justified. After receiving approval from Mr. Lehmann and Mr. Zunk, Ms. Rios discharged the three employees.

Mr. Lehmann, Ms. Rios and Mr. Zunk credibly testified that when they made the discharge decisions, they were not aware of the January 2, 1998 letter which Ms. Fumero gave to Manager Wiggins. Based on this testimony, I find that the letter did not play any part in the decision to discharge the three individuals. Therefore, I cannot find, as alleged in Paragraph 8(c), that the alleged Discriminatees were discharged because they engaged in the conduct described in Paragraph 4.

In other words, I conclude that the General Counsel has not proven the first allegation in Complaint paragraph 8(c), that Respondent discharged these employees "because its employees engaged in the conduct described . . . in paragraph 4" of the Complaint.

However, Complaint paragraph 8(c) alleges not only this retaliatory motive, but also that Respondent discharged the three workers to discourage employees from engaging in other, similar protected activities. I still must determine whether the evidence establishes this second alleged motive. I find that the employees were discharged for this second unlawful purpose alleged in the Complaint.

The main evidence I have relied upon in making this finding is found in Employer's Exhibits 20(a) through 20(k). The record strongly suggests that these memos and letters from the leads to Ms. Rios were the only documents considered by Ms. Rios and the other two managers when they made the discharge decisions.

The evidence pretty clearly indicates that they did not conduct an independent investigation. Certainly, they did not call in the three employees, Ms. Cintron, Ms. Reyes and Ms. Fumero, and ask them for their version. So I am left with the conclusion that whatever the managers knew about the situation came from the letters which are in evidence as Employer's Exhibit 20.

At the very least, these letters formed a major part of the information available to Managers Rios, Zunk and Lehmann when they made the discharge decision. These letters, I believe, establish one of two things. They establish either that the alleged discriminatees had, in fact, engaged in protected concerted activities or else that management believed they had.

I say, "or else" because the letters, at least some of them, make statements which are clearly hearsay in nature and cannot be accepted for the truth of the matters they assert. However, the letters and memos can still be accepted as providing information upon which the managers acted in making the discharge decision. As the General Counsel pointed out in argument, if the managers acted out of a belief that employees had engaged in protected activity, it is no different legally from acting with the knowledge that the employees really had engaged in such protected activity. Either way, discrimination based upon that protected activity or presumed protected activity would be unlawful.

Employer's Exhibit 20(h) is a memo to Ms. Rios from Mayra Wiggins, a cabin service coordinator, who is also the spouse of manager Lester Wiggins. The coordinators are in a position to be a conduit of information from the leads to higher levels in the company. Clearly, that was the intent of Ms. Wiggins when she wrote the memo on March 13, 1998, which is Employer's Exhibit 20(h), because she says in that memo, and I quote: "Since I work in the office most of the people come to me to complain about this group, Blanca Cintron, Carmen Reyes, Judith Fumero, and Nilda Lopez."

Then her letter goes on to describe "Examples of the numerous complaints against these people . . . " I will only quote some of these examples. (The memo has a number of typographical errors but for accuracy, I will quote it verbatim even though the grammar may not always be clear.) At one point in the memo, Ms. Wiggins states:

> If you ask someone to stay overtime or to work a few hours extra to help during the rush, this group of people complain and harass the other co-workers and they feel uncomfortable working around this group.

Here is another quotation:

> If the company or leads have to make adjustments or changes to their job assignments for them everything to them is illegal. They keep telling everybody else where their believes are right and this makes everyone else confused.
>
> If anyone don't agree with something that they say they are called traitors and tell them that they must all stick together for their beliefs."

On the second page of her memorandum, Ms. Wiggins reported that "most of the senior people are very upset" because of comments made by the four employees, Cintron, Reyes, Fumero and Lopez. She described the comments in this fashion: ". . . if you allow the company to treat you as slaves you are all stupid. But not us. We are not slaves or stupid like all of you."

Ms. Wiggins' memorandum, and particularly the portions I have quoted, clearly indicate that Cintron, Reyes, Fumero and Lopez had acted concertedly to change working conditions. Significantly, Ms. Wiggins refers to these four employees as a "group." Additionally, when they urged other employees to stick up for their rights and not "allow the company to treat you as slaves," they were trying to persuade other employees to engage in concerted activities.

Certainly, the words attributed to Cintron, Reyes, Fumero and Lopez were not polite and, frankly, a statement that "We are not slaves or stupid like all of you" may not have been the most persuasive way to win the hearts of others for their cause. However, it is irrelevant that Dale Carnegie might have chosen some gentler phrases. The law does not exclude statements from its protection because the words may be ineffective as advocacy or impolite. The law protects very robust expressions regarding the need for concerted activities.

Section 7 of the Act specifically guarantees employees the right not only to form a Union and to bargain, but also to act collectively with each other for their mutual aid and protection. And the statements Ms. Wiggins attributed to the Discriminatees in this case indicate pretty clearly that they were urging other employees to act collectively for their mutual aid and protection.

Other letters and memos in Respondent's Exhibit 20 also suggest that the alleged Discriminatees were seeking to engage other employees in protected, concerted activities. Clearly, the alleged discriminatees were seeking to change other employees' attitudes about their work. One of the memos complaining about the discriminatees suggests that the attitudes of other employees would become better if these three employees were discharged. Specifically, the memo from Linda Hernandez, in evidence as Employer's Exhibit 20(j), names Cintron, Lopez, Fumero and Reyes as causing the problems, and states "if these employees were not here, the problem would stop. I know this for a fact."

During the hearing there was testimony indicating that, in fact, after the discharges of the three, the other employees identified in these memos did change their attitude, and the General Counsel suggests that this may be due to a fear of meeting the same fate. But for whatever reason, it would seem that these discharges certainly discouraged employees from expressing the concerted sentiments that the three Discriminatees had expressed before.

Significantly, the letters and memos from the leads conveyed the clear impression that the alleged Discriminatees were acting as a group. For example, the letter from Lead Octavia Hemmings, in evidence as Employer's Exhibit 20(k), states "If you have a problem with one of these Lady [sic] you will have problems with all of them." This letter specifically names two of the three alleged Discriminatees (Carmen Reyes and Blanca Cintron) as well as two other employees who were not discharged.

A letter from another lead, in evidence as Employer's Exhibit 20(c), names the three alleged discriminatees and one other employee and states, in part, "they complain about their job[s] they get all the other employees upset . . . they refuse to do what is asked of them without complaining."

Another letter, in evidence as Employer's Exhibit 20(d), identifies the same four employees and states that "Their influence has begun to spread rampant throughout our dept. . . ." A memo from still another lead, in evidence as Employer's Exhibit 20(e), states, in part, "Some of them like to agitate the whole group and because of them we are having all these problems."

Anyone reading the leads' letters and memos could not escape the conclusion that there were three or four complaining employees seeking to spread discontent to other workers. Moreover, as discussed above, these letters and memos also left an inescapable impression that the three or four complaining employees were acting as a group.

This impression, that the complaining workers acted in concert, also draws support from the testimony of Octavia L. Hemmings, a lead. When asked whether these employees complained individually, Ms. Hemmings replied, "Two or more together. Never one person."

Although the letters and memos which Personnel Manager Rios received from the leads clearly suggested the concerted nature of the complaints, some of them also indicated that the alleged Discriminatees had engaged in activities which clearly are not protected by the law, for example, refusing to do work. It is necessary to analyze the discharges in terms of the framework which the Board has established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and in subsequent cases.

Under this framework, the General Counsel first must establish a prima facie case. Determining whether the General Counsel has done so entails four steps.

At the first step, the General Counsel bears the burden of showing that employees engaged in protected activity. As I mentioned, that burden is satisfied by showing that the Respondent believed the employees had engaged in protected activity at the time it made its decision to take action against them.

The documents that are in evidence as Respondent's Exhibit 20(a) through (k) establish that the Discriminatees did engage in concerted protected activity and, therefore, I find that the General Counsel has met the first step of the *Wright Line* test.

At the second step the government must show that the Employer had knowledge of the concerted activities. Since these memoranda were given to Ms. Rios, the human resources manager, there is no doubt about that. I find that the Government has met the second *Wright Line* requirement.

At the third step there must be a showing of an adverse employment action. In the job setting, firing someone is just about as adverse as it gets. So the government has established the third step of the *Wright Line* test.

The final step involves showing a connection or a nexus or a link between the activities that were protected and the adverse action that resulted. In this case, again, the letters and memos in Respondent's Exhibit 20(a) through (k) demonstrate that link, because these were the documents the managers relied upon in making the discharge decision. So I find that the General Counsel has satisfied all four steps of the *Wright Line* test and, therefore, has proven a prima facie case.

At this point the burden shifts to the Respondent, which can rebut the prima facie case by showing that it would have made the same decision even if the Discriminatees in question had not engaged in any protected activities at all.

In the recent case of *Lampi LLC*, 327 NLRB No. 51 (November 30, 1998) [322 NLRB 222 (1998)], the Board explained that to meet this burden, the Respondent has to make a showing regarding how it has treated employees in situations which were similar except not involving

protected activity. If the evidence shows that the Employer has treated other employees in such situations in the same way it treated the alleged Discriminatees here, it bolsters a conclusion that the Employer would have discharged these employees in any case, even if they had not been engaged in protected activity.

On the other hand, if the Respondent does not show that it has administered the same sort of discipline to other employees in situations which are similar except not associated with protected activity, there is little reason to believe that the Discriminatees' protected activity made no difference to their fate.

In my view, this is an extremely close case. In evaluating the Respondent's defense, I must be careful not to substitute my judgment for that of the Employer.

I do not sit here to say, "Well now, if I had been the boss I would not have fired that person or if I had been the boss I would have." It would be highly improper for me to engage in that kind of reasoning. Instead, I must say, in essence, "Well, no matter what I may think of this company's procedures and values as far as the personnel system is concerned, and no matter what I may think of the employee's conduct, did the company do the same thing it would have done in the absence of protected activity?"

There is a lot of evidence that the three Discriminatees would refuse job assignments, and even when they did not refuse job assignments, that they would give, as we parents say to our kids, a lot of "backtalk" about how they didn't want to do the assignments, or how they needed a man to lift the bag of trash to the dumpster, or ask why aren't there gloves here, or interject all sorts of comments that would make it not particularly pleasant to tell them to do work. This evidence must be considered carefully both to determine the appropriate weight it should receive, and also to decide which statements made by the alleged Discriminatees fall under the Act's protection, and which do not.

The Respondent called a number of witnesses who testified regarding these matters. In several cases I do not credit their testimony.

In particular, I have difficulty with the testimony of Ms. Carrie Core and Ms. O. T. Hemmings. I believe it was Ms. Core who said that she had told Mr. Wiggins that she was ready to quit, either her lead position or all together. However, Mr. Wiggins, who impressed me as a reliable witness, said that Ms. Core never made such a statement to him.

Moreover, Ms. Core's letter to Ms. Rios, Employer's Exh. 20, does not contain a threat to quit, although it does state that "it is becoming more difficult to even get oneself prepared to come to work."

Ms. Hemmings testified that she had to take an antidepressant because of stress. Undoubtedly, workplace stresses probably did aggravate whatever condition she had because that's normal for a workplace to be stressful and to do that. But I believe it would be error to conclude that the three alleged discriminatees created the need for Ms. Hemmings to take the antidepressant. Similarly, I believe it would be incorrect to conclude that because Ms. Hemmings discontinued taking the antidepressant after the three discriminatees were discharged, these three employees caused the depression. That reasoning would constitute the fallacy of post hoc, ergo propter hoc. I do not find the evidence sufficient to establish that the activities of the Discriminatees drove any particular person to depression.

Both on direct examination by Respondent and cross–examination by the General Counsel, Ms. Hemmings testified that Fumero, Reyes and Cintron refused to do assigned job duties two to three times a week. Additionally, on cross–examination Ms. Hemmings added that almost every time one of these employees refused to perform a job, she would inform the supervisor.

However, when I asked Ms. Hemmings why the employees who refused to perform work assignments two to three times a week were not given disciplinary write-ups more often, she answered, in part, "It wasn't say—let's not say all the time." The remainder of her answer seemed, at best, confusing to me.

The evidence convincingly establishes that Respondent has a compelling financial interest in cleaning aircraft faster than the time allowed in the contracts with its customers. That is how it earns bonuses.

On the other hand, Ms. Hemmings' testimony indicates that the three alleged discriminatees consistently refused to perform work and that she reported these refusals to supervision. It is inherently implausible that management, under heavy time pressure, would simply ignore or tolerate repeated refusals to work.

I discredit the testimony of Ms. Core and Ms. Hemmings. In doing so, I rely in part on my observations of their demeanor and in part on the fact that if the employees were really refusing to do the work with the frequency that the leads testified, they would have been subjected to all sorts of discipline.

The Respondent, in presenting evidence to meet its Wright Line burden of rebuttal, introduced disciplinary records involving other employees. Some of those records dealt with employees who had refused to do work and consequently received discipline.

Respondent demonstrated a willingness to impose such discipline. So, it is difficult for me to believe that, considering the pressures Respondent faced in getting these planes clean, that it would not have been willing to exercise the same disciplinary power if the employees in question really were refusing to do their jobs.

The sense that I got from the record as a whole was more that these employees complained about work assignments incessantly, but then they would go ahead and do the work. Now, that certainly made for a less-than-pleasant working environment. But the complaints, at least to the extent they involved two or more people or one person speaking on behalf of two or more people, were protected concerted activity.

Another factor that makes me dubious that the Discriminatees really engaged in the excesses that some of the leads attributed to them is the fact that there was not a close connection between instances of misconduct and the discharge.

For example, Mr. Louie Torres testified that on or about February 19, 1998 he was standing on a ramp training a group of recruits in how to unload the planes. Two of the discriminatees, Blanca Cintron and Carmen Reyes, were nearby, and Ms. Cintron yelled out in Spanish something to the effect of, "I want to find out what lies you have been telling these new hires."

That same day or shortly thereafter Mr. Torres wrote a memo, in evidence as Employer's Exhibit 19, which stated that he was embarrassed. He sent this memo on up the chain of command.

From his demeanor, I gather that Mr. Torres was testifying truthfully and that he really was embarrassed. I have no doubt about that.

However, Mr. Torres' memo was dated February 19th. Ms. Cintron wasn't discharged until March 18th and Ms. Reyes was not discharged until March 20th, a month later. It is difficult for me to believe that their action a month earlier was the precipitating cause of the discharge, or even contributed to it to any great extent.

Additionally, as General Counsel's Exhibit 5 evidences, the week before her discharge Ms. Reyes received an award from the Respondent's large customer, Continental Airlines, because of her perfect attendance at work. Again, although it is not entirely inconsistent that she might receive an award for perfect attendance and yet be disciplined and discharged for refusing to do work, I find it a little difficult to believe that she would show up punctually every day to work, and then refuse to do it. It doesn't form a coherent picture in my mind.

Ms. Fumero had received some disciplinary actions during her employment with Respondent. She testified that during her first week of employment, that is, in late 1994, she was disciplined for failure to put toilet paper in an airplane lavatory. That was about four years before the decision to discharge her.

Moreover, the assertion that Ms. Fumero refused to perform work assignments must be considered together with the testimony of Lead Octavia Hemmings that when other employees did not wish to clean a lavatory on a plane, Ms. Fumero "would do it for them and then she would complain that she did too many bathrooms today, but she volunteered to do for them."

In general, I have doubts about Ms. Hemmings' testimony and have not credited it.

Additionally, Employer's Exhibit 4 documents that Ms. Fumero received a warning in January 1997 for being absent from work without approval. Employer's Exhibit 21, a computer print-out prepared more than a year after Ms. Fumero's discharge, indicates she was late to work on six days in 1998 and absent from work, due to sickness, two days.

However, the events that subjected certain of the employees to discipline do not appear to be the events which precipitated their termination. To the contrary, the events which seemed to precipitate the terminations did not involve the conduct of the employees themselves, so much as the out-pouring of complaints by the leads.

Now, the Respondent, of course and without doubt, had a very legitimate interest in seeing that the work was done smoothly and without delay, and in assuring that the teams functioned, if not harmoniously, at least efficiently. Moreover,

there can be no doubt that constant complaining and friction would interfere with that efficiency. However, my job is not to determine whether the Respondent had a justification which might, to an arbitrator or to an outside observer, seem sufficient. Rather, my job is to determine whether that same reason would have caused the discharges absent the protected activity.

The fact that the Respondent's managers did not investigate the matter or give the Discriminatees a chance to tell their side concerns me—not because I sit in judgment of the Respondent's internal procedures because I do not—but because credible testimony establishes that in the usual case the Respondent does conduct some investigation and does give the accused person a chance to state his or her side.

So I must infer from that departure from usual practice that there was some degree of haste and some intent to eliminate the complainers rather than address the complaints. Again, what Respondent chooses to do is its own business and not before me, except to the extent that the Respondent's action interferes with the right of employees to complain in concert, because such concerted complaints are protected by the Act.

I should address one more point, and that is that not every statement made by two or more employees in concert enjoys statutory protection. The law protects concerted complaints about wages, hours and working conditions, but mere backbiting, name-calling, pettiness and gossip unrelated to the conditions of employment do not fall within that definition.

Perhaps the most vivid evidence of name-calling in this case is the testimony by two leads that Ms. Fumero made a statement referring to someone of African-American descent as a "watermelon eater." Based upon the demeanor of the witnesses, and for the reasons set forth in the oral argument by General Counsel yesterday, I do not find that Ms. Fumero made such a statement.

Although I did not credit Ms. Fumero's testimony because I thought it was confused and affected by emotion, at the same time I got the strong impression that she has a driving sense of what is right and wrong, a sense what might be termed "social justice." Similarly, based upon my observations of Ms. Fumero, I find it very difficult to believe she would ever make a derogatory racial comment about someone else. So I simply cannot credit that testimony.

And that leaves me about where I began with the fact that the leads resented this group of employees for stirring up problems, including Ms. Fumero going to Mr. Wiggins with the letter, resulting in Mr. Wiggins calling a meeting where he voiced his opposition to harassment. So the leads were not disinterested witnesses; they had an emotional ax to grind as well. Therefore, I conclude that much of what they said about the backbiting was colored by their personal feelings.

In sum, the case is very, very close. The Employer has a very strong interest in efficiency of its workforce. And with all of the civil rights laws on the books it has a very compelling interest in creating a workplace environment that is free of any form of harassment. But in this case I do not believe the Employer's action showed that it was motivated so much a desire to create this sort of environment as it was motivated by a desire to stifle the voices of criticism.

Therefore, I find that Respondent violated Section 8(a)(1) of the Act as alleged in the Complaint, and recommend that the Board order Respondent to reinstate Blanca Cintron, Judith Fumero and Carmen Reyes and make them whole, with interest, for all losses they suffered because of Respondent's unlawful discrimination against them.

When the transcript in the proceeding is done and served on the parties and on me, I will issue a Certification of this Bench Decision, which will include Notice, Order and Remedy of Provisions.

I will also correct any errors I have made in trying to recite my Bench Decision from memory after my computer crashed. The corrected transcript of this bench decision will be attached as an appendix to the Certification. When the Certification is served on the Parties that will start to run the time period for filing exceptions to my decision.

I want to thank the Parties for their professionalism and their very stimulating advocacy, and tell you it was a pleasure to hear this case.

The hearing is closed. (Whereupon, at 12:20 p.m., the hearing in the above-entitled matter was closed.)